Supreme Court, U.S.
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No. 99-531

In The

# Supreme Court of the United States

L.M.M.,

*Petitioner,*

v.

E.N.O.,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts**

## REPLY BRIEF

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## I. THE MASSACHUSETTS SUPREME JUDICIAL COURT'S DECISION GRANTING VISITATION BETWEEN L.M.M.'S BIOLOGICAL MINOR CHILD AND E.N.O., BY EXPANDING ITS JUDICIAL AUTHORITY AND ADOPTING THE PREVIOUSLY UNRECOGNIZED PRINCIPLE OF DE FACTO PARENTHOOD, IS A FINAL JUDGMENT IN ACCORDANCE WITH 28 U.S.C. § 1257.

E.N.O. correctly points out that this Court's jurisdiction to review a state judgment is confined to a final judgment pursuant to 28 U.S.C. § 1257. However, E.N.O. improperly recognizes that "final" has been defined by this Court as: "[the judgment] must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market St. Ry. Co. v. Railroad Commission of State of California,* 324 U.S. 548, 551, 65 S.Ct. 770, 772-73 (1945).

Consistent with this Court's interpretation of "final", the Massachusetts Supreme Judicial Court's decision is the "final word of a final court." The issue at bar is not whether visitation between E.N.O. and B. would be in B.'s best interests. Rather, the issue is whether the court violated the Separation of Powers doctrine and L.M.M.'s constitutional rights by granting visitation, without express statutory authority, between L.M.M.'s biological child, who is properly in L.M.M.'s custody, and E.N.O., who is neither the biological nor adoptive parent.

As a result of the court's decision to grant such visitation based on its purported equity jurisdiction and

the previously unrecognized principle of de facto parenthood, E.N.O. (as well as other legal strangers) can henceforth have standing to petition a Massachusetts' court for visitation with a non-biological child against the child's biological mother or father.

## II. THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO CONSIDER THE SEPARATION OF POWERS ISSUE, THE FUNDAMENTAL RIGHT ISSUE AND THE PROCEDURAL DUE PROCESS ISSUE, AS ALL SUCH CONSTITUTIONAL ISSUES WERE CONSIDERED BY THE MASSACHUSETTS SUPREME JUDICIAL COURT.

L.M.M. recognizes that this Court, in the exercise of appellate jurisdiction, will only, except in rare occasions, consider issues that were raised or decided in the state's highest court whose judicial action this court is requested to review. *McGoldrick v. Compagne General Transatlantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 672-73 (1940). *See In re Linda Coal and Supply Co.*, 255 F.2d 653, 656 (1958) (discussing appellate court's jurisdiction confined to questions presented from lower court or implicit in court's decision).

The record before this Court demonstrates that the dissenting opinion of the Massachusetts Supreme Judicial Court, which comprised of one-third of the justices, discussed in depth that the majority's decision based on its purported "equity" jurisdiction and de facto parenthood principle was "a remarkable example of judicial lawmaking", "denigration of parental rights" and "the judicial infringement on the province of the Legislature effected by the court's decision." (App. 17). Indeed, the dissenting

opinion vigorously focused their opinion on their belief that the court violated the Separation of Powers doctrine and L.M.M.'s Fundamental Right to rear her child without state intervention. (App. 17-29). The court also acknowledged L.M.M.'s protestation that the visitation order "restricts her fundamental right, as a fit parent, to the custody of her child." (App. 14-16).

Moreover, at oral argument before the Supreme Judicial Court, L.M.M.'s counsel was confronted with the issue regarding the court's "equity" jurisdiction, including whether such jurisdiction violated the court's authority (i.e. the Separation of Powers doctrine).

It is also apparent in the court's decision that L.M.M. raised, and the court decided the issue of whether L.M.M.'s procedural due process rights were violated as a result of the lower court's refusal to allow her to conduct an evidentiary hearing and allow her the opportunity to cross-examine the Guardian ad Litem before the court granted visitation. (App. 16, fn 13). Specifically, the court addressed L.M.M.'s argument, distinguishing between the present case and *Gilmore v. Gilmore*, 369 Mass. 598, 341 N.E.2d 655 (1976), which L.M.M. cited to support her argument. (App. 16, fn 13). The *Gilmore* Court found that the appellant's procedural due process rights were violated as a result of the lower court's refusal to allow the Guardian ad Litem to testify, thereby improperly denying the appellant the ability to cross-examine the Guardian ad Litem. *Id.* at 604-05, 341 N.E.2d at 659.

Simply put, the Massachusetts Supreme Judicial Court expressly discussed and consequently, decided the case, inter alia, on the same constitutional issues L.M.M.

has properly raised in her Petition for Writ of Certiorari. Accordingly, this Court has jurisdiction to consider whether the Supreme Judicial Court's decision violated the Separation of Powers doctrine, L.M.M.'s Fundamental Rights and her Procedural Due Process Rights.

## CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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